No. 2774

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IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

LANCASHIRE SHIPPING COMPANY, LIMITED (a corporation), claimant of the British steamer "Skipton Castle", her engines, tackle, apparel and furniture, and all persons intervening for their interest therein,

Appellant,

vs.

THE AMERICAN IMPORT COMPANY (a corporation), TILLMAN & BENDEL (a corporation), JAMES L. DE FREMERY and HENRI M. SUERMONDT, copartners doing business under the firm name of Jas. de Fremery & Co., THE APOLLINARIS COMPANY, LIMITED (a corporation),

Appellees.

BRIEF FOR APPELLANT.

EDWARD J. McCUTCHEN,
IRA A. CAMPBELL,
McCUTCHEN, OLNEY & WILLARD,
Proctors for Appellant.

Filed this.....day of May, 1916.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

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Statement of Facts.

This is an action for damage to cargo.

The British steamer "Skipton Castle", a modern cargo vessel, loaded in Antwerp, for carriage to San

Pedro and San Francisco, a quantity of bottled mineral water (apollinaris, etc.), willowware baskets and general cargo. On arrival at the aforesaid ports of discharge, a large part of the bottles was found to have been broken, and the water wasted and the baskets rotted.

The cargo was shipped under bills of lading which stipulated that the ship should not be liable for loss or damage occasioned by, *inter alia,* decay, or the indirect causes thereof, heat, sweating, leakage, breakage, wastage, etc.

The damaged cargo was stowed in No. 1 'tween decks, being the cargo compartment farthest forward and immediately beneath the ship's weather deck. In No. 1 hold, below No. 1 'tween decks, was stowed a large quantity of bone meal. Shortly after the commencement of the voyage, the bone meal heated from unknown causes, and the temperature in No. 1 'tween decks apparently so raised that the bottles broke from the gas pressure thereby generated from the mineral water.

The voyage outward from Antwerp and Hull was without special incident, save the heating of the bone meal. The steamer left Antwerp on December 18, 1910, called at Hull on the following day for coal and stores, and finally departed on her voyage on the 21st. She stopped for coal at Las Palmas on the 29th, getting under way again on the 30th. She subsequently arrived at San Pedro on February 22, 1911, and at San Francisco on March 4th.

The libel alleged a shipment of the cargo aboard the steamer in good order and condition, and its delivery

in bad order and condition. The damages were charged to have been inflicted while the cargo was in the possession of the steamer, by water and breakage and leakage of the bottles, due to bad stowage and unseaworthiness. Existence of some of the damage was admitted, other allegations thereof denied, but it was alleged affirmatively by appellant (claimant) that the damage was within the aforesaid exceptions of the bills of lading exempting the steamer from liability for loss or damage by breakage, wastage, decay, sweating, heat, etc.

The case was tried largely on depositions, although some evidence was heard in open court. Following its submission, the District Court rendered its opinion, holding claimant liable for the damage because of the failure of those on board the steamer, while at Las Palmas, to remove the cargo stowed on the 'tween decks hatches, close the hatches, and care for any merchandise then found to be suffering injury because of heat or moisture, by drying and airing it. From the decree thereafter entered this appeal was duly prosecuted.

Specifications of Errors.

Errors have been assigned in the Apostles on Appeal to the decree of the District Court. We have grouped them for convenience under the following specifications:

I.

The court erred in not holding and deciding that the damages were within the exceptions of the bills

of lading and that appellees had not sustained the burden of proving that the damages were caused by negligence on the part of the carrying steamer. (Assignments of Errors I, III, IV, V, VI, VII, VIII, IX, X.)

II.

The court erred in holding and deciding that there was any negligence on the part of the carrying steamer in the loading, stowing, custody or care of the cargo. (Assignments of Errors I, II, IV, V, VI, VII, VIII, IX, X.)

III.

The court erred in not holding and deciding that due diligence had been exercised to make the steamer in all respects seaworthy, properly manned, equipped and supplied, and that if there was any negligence causing or contributing to the damages to said cargo, it was error or fault in the navigation or management of the vessel within the exemptions of the third section of the Harter Act. (Assignment of Errors XII.)

IV.

The court erred in not holding that the damages were caused by the inherent defect, quality or vice of the bone meal, within the exemptions of the third section of the Harter Act. (Assignment of Errors XI.)

The Argument.

I.

THE EVIDENCE SHOWING THAT THE DAMAGE TO THE CARGO WAS BREAKAGE, WASTAGE AND DECAY CAUSED BY HEAT, WITHIN THE EXCEPTIONS OF THE BILLS OF LADING UNDER WHICH THE CARGO WAS SHIPPED, THE BURDEN OF PROVING THAT SUCH DAMAGE WAS CAUSED BY THE NEGLIGENCE OF THE CARRYING STEAMER RESTS UPON APPELLEES.

The evidence showed that the damage to the bottles was breakage, wastage of their contents, rotting of the straw covers, and damage to the wrappers, all of which was caused by the heating of the bone meal. (Ap. pp. 75, 77, 105, 106.) The damage to the willowware was decay. (Ap. pp. 61, 62-68, 70, 73.)

The bills of lading stipulated that the ship should not be liable for loss or damage occasioned by, *inter alia,* decay, or the indirect causes thereof, injury to wrappers, however caused, heat, sweat, leakage, breakage, wastage, etc.

The evidence thus clearly establishing that the damage to the merchandise was plainly within exceptions of the bills of lading, the burden of proving that the damage was caused by negligence on the part of the carrying steamer rests upon appellees. This principle of law is well settled. It was so held in

> *Jahn v. The Folmina,* 212 U. S. 354; 53 L. ed. 546,

wherein Mr. Justice White said:

> "Of course where goods are delivered in a damaged condition plainly caused by breakage, rust

> or decay, their condition brings them within an exception exempting from that character of loss, as the very fact of the nature of the injury shows the damage to be prima facie within the exception, and hence the burden is upon the shipper to establish that the goods are removed from its operation because of the negligence of the carrier. But, in a case like the one before us, where showing an injury by sea water does not, in and of itself, operate to bring the damage within the exception against dangers and accidents of the sea, it follows that it is the duty of the carrier to sustain the burden of proof by showing a connection between damage by the sea water and the exception against sea perils. For the distinction between the two, see The Henry B. Hyde, 32 C. C. A. 534, 61 U. S. App. 147, 90 Fed. 114, 116; The Lennox, 90 Fed. 308, 309; The Patria, 68 C. C. A. 397, 132 Fed. 971, 972."

In

The Bohemia, 35 Fed. 756,

a libel for damages was dismissed as the causes of the injuries were "decay" and the "prolongation of the voyage", within the exceptions of the bills of lading, and no negligence or failure of duty on the ship's part was shown by the libelant.

The rule was followed by this court in

The Henry B. Hyde, 90 Fed. 114,

wherein Circuit Judge Gilbert dismissed the libel, as the damage was shown to have been breakage within the exemptions of the bill of lading, and no evidence was offered to prove that it was caused by negligence.

In

Wolff v. The Vaderland, 18 Fed. 733, 739,

District Judge Brown said:

> "When the damage complained of is ascertained to be within any of the exceptions of the bill of lading, the burden of proof is then changed, and the carrier is not liable, unless it be shown by the shippers 'that the damage might have been avoided by the exercise of reasonable skill and attention on the part of the persons conveying the goods; for then it is not deemed to be, in the sense of the law, such a loss as will exempt the carrier from liability, but rather a loss occasioned by his negligence and inattention to his duty'."

The Circuit Court of Appeals for the Second Circuit, enforcing the rule in

The Baralong, 172 Fed. 220,

said of it:

> "Under both bills of lading we think that, in view of the exception of damage from heat, the burden rested upon the libelant to show that the carrier was negligent in stowing or ventilating the cargo or otherwise. This he failed to establish."

Again, in

The Koranna, 214 Fed. 172,

District Judge Hazel stated the rule as follows:

> "It is well settled, I think, that, whatever damages which are attributable to causes excepted in the bill of lading are sustained in the transportation of merchandise, the burden of proof is upon the libelant to show that the loss occurred through the negligence of the carrying vessel as she is not permitted to exempt herself from the consequences of her negligence or lack of diligence and care in the transportation of property."

The Neidenfels, 174 Fed. 293;

The Konigen Luise, 185 Fed. 479.

The breakage of the bottles, and the decay of the straw cases and willowware, were caused by the heating of the bone meal. Exemption from liability for damage by heat was stipulated in the bills of lading. Such damage, therefore, falls within operation of the burden of proof rule.

The New Orleans, 26 Fed. 44;
The Pearlmore, 9 Asp. Mar. Cas. 540.

No grounds exist for removing the case at bar from the application of the rule thus settled in the maritime law. It follows, therefore, that appellees are not entitled to recover for the damage in question unless a fair preponderance of the evidence shows that it was caused by the negligence of the steamer. This has not been established.

II.

THE EVIDENCE FAILS TO SHOW THAT THE DAMAGE TO THE CARGO WAS CAUSED BY THE STEAMER'S NEGLIGENCE.

The Cargo was Carefully Loaded and Properly Stowed.

The evidence shows that the bone meal was loaded at Antwerp and stowed in No. 1 lower hold (Ap. p. 141) under the supervision of the officers of the ship, and Captain Baines, a surveyor of many years' experience. (Ap. pp. 120, 145, 185.) It was taken aboard in the winter time (Ap. p. 126), from covered sheds, the sides of which were open (Ap. p. 170). At least part of it was loaded as it came down to the wharf, and was taken from there aboard ship. (Ap. p. 198.) The

weather was damp and sultry. (Ap. p. 138.) It rained while the vessel was at Antwerp (Ap. pp. 138, 183), but the bone meal was not loaded in the rain, and the hatches were kept covered during the rain, so that no water could get into the holds. (Ap. pp. 141, 144-5, 183, 190, 192.) The bone meal was not taken aboard damp or wet, but was in good condition so far as external examination showed (Ap. pp. 169, 176, 191, 192, 193-4), nor did it get wet after it was loaded (Ap. pp. 61, 185, 191-2). The bone meal was stowed over sacks of pebbles which were dry (Ap. pp. 194-5, 200), and was protected against dampness from the sweating of the ship's sides by dunnaging with mats (Ap. pp. 196-197).

The Mineral Water was Properly Stowed.

The mineral water was stowed in the forward part of the 'tween decks of No. 1 hold, and the willowware and general cargo in the hatchway and a few in the wings of the same compartment. (Ap. pp. 121-2, 131-2, 138-9, 162-4.)

It was the consensus of opinion of every witness questioned that No. 1 'tween decks was the best part of the ship in which to stow the mineral water. (Ap. pp. 46, 82, 134, 137, 159, 167, 168, 171, 175, 178, 216-17, 240.)

There was not an iota of evidence to the contrary.

The Ventilation of the Cargo was Efficient.

The 'tween deck compartment and the No. 1 lower hold were equipped with standard ventilators, which were carefully and attentively used throughout the

voyage to care for the cargo. (Ap. pp. 123-6, 131-2, 142-4, 146-7, 150-2, 156, 163-7.) The hatches were removed for ventilating purposes whenever weather permitted, and awnings were spread over the fore deck while in the Tropics. (Ap. pp. 132-4, 138, 142-3, 146, 156, 164-7, 190.) The ventilators to No. 1 'tween deck and lower hold were as large as those to No. 2 hold, a larger compartment (Ap. p. 150), and were of equal size to those on similar cargo carrying vessels. (Ap. pp. 81, 160, 205, 214-6, 233-4.)

The Heating of the Bone Meal was Not Attributable to Negligence of the Steamer; Nor was It a Substance Likely to Heat.

The bone meal heated, but from what source is unknown. It may have been due to a dampened condition not disclosed by external appearances, or it may have been due to an imperfect curing of the product. (Ap. pp. 61-69.) Whatever the cause, the evidence certainly establishes that it gave no appearance of a condition which might cause it to heat; nor was it an article likely to heat.

The uncontradicted testimony of Mr. Bunker, agent of the Pacific Mail S. S. Co., which has continuously, for many years, carried great quantites of bone meal in its trans-Pacific steamships (Ap. pp. 55-60); of Mr. Watkins, superintendent of the Hawaiian Fertilizing Company, which has imported many tons, both from Calcutta and Europe (Ap. pp. 223-8); of Captain Woodside, manager of the San Francisco Stevedoring Company, who has discharged large shipments arriving

at the port of San Francisco (Ap. pp. 44-6), and of Captains Baird and Holliday, who have been officers in vessels carrying it as cargo, particularly in the West Indies trade (Ap. pp. 81-2, 234-5), all disinterested witnesses, was to the effect that *bone meal is not a cargo likely to heat.* Of all the great quantities transported over all the seas, those witnesses had never known it to heat. On the other hand, no evidence of any kind was offered by libelants of its ever having heated in course of transportation.

Summarizing: There was No Evidence of Negligence in Loading, Stowage or Care of Cargo or of Unseaworthiness of Vessel.

The evidence thus adduced discloses no negligence on the part of the owners, officers or crew of the "Skipton Castle", with respect to the cargo, or any unseaworthiness in her hull, machinery or equipment. On the contrary, it shows that the vessel was a modern cargo carrying steamer, equipped with approved ventilators. The bone meal showed no evidence of wet or dampened condition, or of its likelihood to heat. True, it was loaded in sultry and damp weather, but that was a climatic condition over which claimant had no control, and must have been known to every shipper. Every care was taken to see that the cargo, including the bone meal, was not wet by rain, either while awaiting shipment, or while being loaded, or after it was on board, for the cargo was stored under covered sheds and was not loaded in the rain. The precaution

of closing the hatches was taken when it did rain, so that none reached the cargo compartments of the vessel. The cargo was properly stowed under the supervision of the ship's officers and an experienced surveyor. Upon the voyage the holds were regularly ventilated with due care and diligence, and everything done that could be done to assure the cargo's safe transportation. Indeed, no evidence of unseaworthiness, or of the bone meal being taken aboard in a dampened or wet condition or of improper stowage, or of failure to care for the cargo on the voyage, was offered by libelants.

The evidence likewise shows that the bone meal was not *per se* such a substance as claimant or the officers or crew of the vessel could anticipate was likely to heat. Experience has not shown us that it would, so that it cannot be said that it was negligence, or improper stowage, to stow the bone meal in No. 1 lower hold and the mineral water and willowware in No. 1 'tween decks.

In these circumstances, therefore, we respectfully submit that appellees have completely failed to sustain the burden of proof resting upon them, in that they have not shown any negligence with respect to the cargo, which should deny to claimant the benefit of the exemptions of the bills of lading. It not having been shown that the damage to the cargo was caused by the steamer's negligence, the libel should be dismissed.

III.

THE DISTRICT COURT ERRED IN HOLDING THAT LIBELANTS WERE ENTITLED TO RECOVER.

The District Court held that libelants were entitled to recover because the steamer did not take out the cargo stowed over the 'tween deck hatch, and close that hatch leading to the lower hold, and dry and air the merchandise. We quote the salient portions of the opinion that we may have the position taken by the court clearly before us:

> "The merchandise in question, particularly the mineral water, was stowed in No. 1 between decks because every one recognized the necessity of having it stowed where it might be kept as cool as possible and not be subjected to sudden and violent changes of temperature. Yet within five days after it was so stowed it was ascertained that the temperature of the hold immediately beneath it was nearly 50 degrees hotter than the temprature of the air, and nearly twenty degrees hotter than that of the other holds although it should ordinarily be cooler than any of them. This condition continued day after day, the officers knowing that the hot air of No. 1 hold had free access to No. 1 between decks, and that the mineral water therein stowed was peculiarly susceptible to heat, and had been stowed there, according to their own testimony, in order that it might be kept as cool as possible. Nothing was done to relieve the situation. Although the master testified that it would be absolutely impossible, without jettisoning the cargo, to get into any of the lower holds for the purpose of restowing cargo, and that when he found there was a difference of 25 degrees in temperature there was no place to take the cargo out, still it does not appear that it would have been difficult, certainly not impossible, during

the fine weather then experienced, and particularly while lying at Las Palmas, to move or raise such portion of the cargo as was on the square of the hatch, and to close the hatch between No. 1 between decks and No. 1 hold, so that the heated air of the latter might rise through the ventilator without reaching the between decks. If any of the merchandise in question was then found to be suffering injury because of heat, or because of moisture caused by bursting bottles, such portion might have been cared for by drying and airing it. The hatchway between No. 1 between decks and No. 1 hold was twenty-four feet long and sixteen feet wide, and the depth of No. 1 between decks was between seven and eight feet. The cargo stowed on this partly covered hatch consisted for the most part of baskets. It does not seem that any insuperable difficulty should attend the raising of such portion of a cargo of basket ware as covered a hatch twenty-four by sixteen feet to a depth of not exceeding eight feet, or that it would be at all necessary to jettison the same, and I cannot escape the conclusion that the failure to make any effort whatsoever to relieve the conditions then known to exist was such negligence in the care of the cargo as will render the ship liable for the damage occasioned thereby. It is not impossible that the ship may be liable for other reasons suggested by counsel for libelants, but I am satisfied that she is liable for the reasons set forth."

Bearing in mind that the rule which the District Court should have applied, and which we respectfully submit it failed to do, imposed upon libelants the burden of proving that the injuries to the cargo by breakage, wastage and decay, caused by heat, were due to the steamer's negligence, the pertinent inquiry is: *Did the evidence show that the damage in question was caused*

by a negligent failure to take out the cargo stowed over the 'tween deck hatch and close the hatch and dry and air the merchandise? Unless a fair preponderance of the evidence establishes that the injuries were so caused, the District Court erred. We submit that the evidence does not so show it.

The "Skipton Castle" left Antwerp on December 18, 1910, and arrived at Hull on the night of the 19th. On completion of her loading and coaling, she sailed from Hull on the morning of December 21st. The temperatures of the various holds were first taken on December 22nd, and they were found to be 101° in No. 1 lower hold; 83° in No. 2; 82° in No. 3; 84° in No. 4, and 87° in No. 5. Thereafter the temperatures prevailed as follows:

	No. 1	No. 2.	No. 3.	No. 4.	No. 5.
Dec. 23	100°	84°	83°	85°	86°
Dec. 24	101°	85°	84°	84°	88°
Dec. 25	103°	83°	83°	82°	88°
Dec. 26	110°	85°	85°	83°	92°
Dec. 27	104°	84°	85°	85°	93°
Dec. 28	104°	85°	85°	85°	92°

The steamer came to anchor at Las Palmas on the 29th of December, and immediately commenced coaling. This was completed on the following day at 2:45 p. m., and at 4:40 p. m. anchor was weighed and the ship proceeded. Temperatures were taken and found to be:

No. 1	No. 2.	No. 3.	No. 4.	No. 5.
110°	85°	85°	82°	90°

Thereafter they were recorded as follows:

	No. 1	No. 2.	No. 3.	No. 4.	No. 5.
Dec. 31	104°	84°	84°		93°
Jan. 3	99°	86°	87°	89°	85°
4	98°	86°	85°	86°	88°
5	97°	87°	85°	85°	89°
6	97°	86°	86°	86°	88°
7	95°	86°	87°	86°	87°
8	93°	86°	87°	85°	87°
9	94°	88°	87°	87°	87°
10	92°	87°	85°	84°	88°
11	92°	85°	85°	86°	84°
12	92°	83°	83°	83°	82°
13	90°	82°	82°	84°	80°
14	84°	84°	85°	84°	84°

Thus it appears that No. 1 lower hold in which was stowed the bone meal had a temperature ranging from 101° on December 22nd to 110° on the 26th, and then to 104° on December 28th, at least seven days prior to the arrival of the "Skipton Castle" at Las Palmas. On the day she left Las Palmas it was as high as it had been three days before she reached that place. Thereafter it gradually lowered until on January 14th the temperature was normal.

The "Skipton Castle" was a modern cargo tramp steamer, constructed of steel. For at least seven days prior to her arrival at Las Palmas, the cargo in No. 1 lower hold was in an abnormally heated condition. Separating that hold from No. 1 'tween deck space was a steel deck through which ran four metal ventilators, two at

the forward end and two at the after end. (Ap. pp. 124-5.) It was on that deck and about those ventilators that the damaged cargo was stowed.

Now, it is a necessary conclusion from the conditions thus existing that the heat of No. 1 lower hold was conducted to the 'tween deck space above through the medium of the steel deck and the metal ventilators. Thus the 'tween deck space was unquestionably heated, with the resultant injuries to the cargo. The mineral water, stowed on top of this heated steel deck, was susceptible to heat, and as a consequence of its existence in No. 1 'tween deck space, the bottles broke.

Manifestly, it is impossible to say that all of the damage to the cargo *was not* caused by the conducting of the heat of the lower hold to the 'tween deck space by the metal deck and ventilators. It is likewise impossible to say that all of the damage to the cargo *was not* completed prior to the arrival of the steamer at Las Palmas. But, unless it was not all so caused, and unless damage was, in fact, caused subsequent to her arrival at Las Palmas, then *it follows that any failure on the part of the steamer to take at Las Palmas the course suggested by the lower court* (and not by any witness) *did not cause the injuries.* And if it did not, the District Court erred, for under the rule of law by which claimant's liability is to be determined, the burden of proving that the damage resulted from negligence, (the cause assigned by the District Court), is upon appellees.

Such burden has not been sustained, for the evidence does not show that the damage was not all completed

before the steamer reached Las Palmas, or that the heat which caused the damage was not entirely conducted to the 'tween deck space by the metal decks and ventilators. The court, then, should have found that appellees had not sustained the burden of proof resting upon them.

So far as the evidence discloses, appellees (libelants) never, during the course of the trial, conceived of the thought that the ship was negligent as found by the court. Such negligence was not charged in the libel, but improper stowage and unseaworthiness were alone alleged. Rather than criticising the officers of the steamer for not having closed the 'tween deck hatch, the burden of libelants' complaint, during the course of examination, was that the hatch was not opened further so as to allow a freer circulation of air into the lower hold. (See Ap. pp. 156-157.)

The rule, to the benefit of which claimant is entitled unless a settled principle of law is to be set aside, imposes upon appellees the burden of showing that negligence caused the damage falling within the exceptions of the bills of lading. The District Court held that such negligence existed in that the cargo on the square of the hatch (No. 1 'tween deck) was not moved or raised and the hatch between No. 1 between decks and No. 1 hold closed so that the heated air of the latter might rise through the ventilator without reaching the between decks, and any injured cargo dried and aired. Such charge of negligence must be grounded upon a fair preponderance of the evidence, and yet there is no evidence, we respectfully submit, to sustain it. The only evidence

adduced which referred to the question as to whether the cargo could have been so raised is the following:

"Mr. Denman. Q. What did you do when you found there was 25 degrees difference in temperature?

A. *I could not do anything.*

Q. Could you not have taken any cargo out and gone down?

A. *There was no place to take cargo out.*

Mr. Campbell. What date was that, Mr. Denman?

Mr. Denman. It was on the 30th of December.

Q. Did you ever have that happen before?

A. Heating?

Q. Yes?

A. No, sir.

(Deposition of J. Nelson Craven.)

Redirect Examination.

Mr. Campbell. Q. Was it possible for you, Captain, to get into any of the lower holds of your vessel while they were filled with cargo for the purpose of restowing it?

A. *No, sir, absolutely not, without jettisoning the cargo.* (Ap. pp. 184-5.)

* * * * * *

Q. As a matter of fact you did all you could to better that condition when you found it hot there?

A. *We could not better the condition that the hold was in, free ventilation.*" (Ap. p. 186.)

That evidence does not show that the cargo could have been treated in the manner in which the court finds it should have been. It is the only evidence bearing upon the matter, and yet the court says that it could have been done, despite the fact that the ship's experienced master, whose judgment is not called in question by any witness, stated that it was impossible without jettisoning to get to the lower hold, which would have been reached

by removing the cargo that the court says should have been raised. There is no evidence in the entire record that it could have been done, and yet to sustain the burden of proof, evidence in fair preponderance thereof was required to be adduced. We submit, then, that the court erred when it held that negligence existed as found, and that its ruling disregards the burden of proof rule.

If libelants had entertained the thought that the cargo could have been so readily handled on a full laden ship, and that failure to do so was negligence, witnesses would have been called and at least some proof offered. But not a word. The record is silent. No witness was called to challenge the testimony of the master. Without evidence in the record upon which to base its finding, the District Court would set aside the only evidence that was introduced. This is not the adherence to the rule to which claimant is entitled.

That the court was seemingly appreciative of the want of the required evidence in the record appears from its suggestion of a "moving" of the cargo in the square of the hatch, in the face of the fact that the evidence shows that the 'tween deck space was filled, and the baskets were stowed in the square of the upper deck hatch (Ap. p. 122) so that it could not be moved. The fact that suggestion is made of a "moving" and a "raising", when the record shows that the moving could not have been done, demonstrates that there was no certain evidence to which the court was there pointing.

The court's conclusion was that the ship should be held "liable for the damage occasioned thereby", re-

ferring to such damage as resulted from a failure to raise the cargo and close the 'tween deck hatch, and prevent the hot air of the lower hold from reaching, through the hatch, the cargo that was injured in the 'tween deck space. There is no evidence that any cargo in the 'tween deck space was injured by heated air rising through the 'tween deck hatch.

The record shows that the beams and some of the covers were laid on the 'tween deck hatch; that the hatchway was fairly tight—only the spaces between the cases, the broken stowage. (Ap. pp. 138-9.) That this must have been compact stowage is evidenced from the fact that it was required to withstand the rolling and tossing of the ship, during the seas incident to a voyage around Cape Horn to San Francisco. The evidence is that the upper deck hatch, immediately above the 'tween deck hatch, was kept open to admit of as much air as was possible to the compartments. Now, one of the commonest known facts of science is that hot air rises. This being true, it is scientifically certain that with the upper deck hatch open, whatever heated air came from the lower hold through the spaces between the cargo stowed on the 'tween deck hatch, immediately ascended through the upper hatch, and did not spread throughout the filled 'tween deck space, for the open hatch above naturally formed an air shaft or flume. If the heated air did not so ascend then it failed to act in accordance with its governing scientific principle. Certainly there is no evidence that it failed. How, then, can it be asserted that such heated air injured the cargo as the court has found? There not only is not any

evidence of it, but the testimony elicited by appellees fails to show that any of the baskets stowed immediately over the 'tween deck hatch, and in the direct pathway of the ascending heated air, were injured. The baskets that were damaged were those stowed in the after portion of No. 1 hold near the top where the after ventilators were. The mineral water was forward of the hatch on the 'tween deck. This appears from the following excerpts:

> "Q. I will hand you what purports to be the stowage plan of the 'Skipton Castle' and ask you to look at it?
>
> A. Do you want me take into consideration everything in this plan?
>
> Q. No, just the forward part; and ask you if that in general shows the stowage plan of the cargo?
>
> A. It does. On the fore part here it was all mineral water. This felting was all abaft of that, in the wings of the hatch coamings and on the after part, all abaft of the cargo, this mineral water. Apparently by this plan we have got mineral water stowed on top of the felt, which was not so at all. That would be very bad stowage in that case.
>
> Q. Were any of the baskets stowed abaft of the hatch?
>
> A. Yes, sir; there were a few stowed abaft of the hatch on top of some general goods.
>
> Q. What was stowed in the square of the hatch?
>
> A. I could not exactly say what was stowed in the square of the hatch, just general goods, felting, and a few barrels of wool grease on the after end.
>
> (Ap. pp. 122-3.)
>
> * * * * * *
>
> Q. Your deck plan shows that these baskets that came to San Francisco were stowed in the after portion of the No. 1 hold at the top of the hold, weren't they; in the after end of No. 1 hold near the top?

A. Yes, sir.

Q. And that is where the ventilators open into No. 1 hold, is it not?

A. Yes, sir, the after ventilators?

Q. Yes?

A. Yes, sir.

Q. And those are the intake ventilators, whenever you can make them?

A. Yes, sir.

Q. These were the baskets that came out injured and mildewed?

A. Yes, sir.

Q. It was only the baskets in the hold with the mineral water that were injured on this trip?

A. Yes, sir.

Q. The baskets in the other hold came out all right, didn't they?

A. Yes, sir." (Ap. p. 199.)

In the course of its opinion, the District Court said:

> "Although the master testified that it would be absolutely impossible without jettisoning the cargo to get into any of the lower holds for the purpose of restowing the cargo, and when he found there was a difference of 25° in temperature, there was no place to take the cargo out, still it *does not* appear that it would have been difficult, certainly not impossible, during the fine weather then experienced, and particularly while lying at Las Palmas to move or raise such portion of the cargo as was on the square of the hatch and *to close the hatch* between No. 1 'tween decks and No. 1 hold, so that the hot air of the latter might rise through the ventilator without reaching the 'tween decks."

It is upon that finding that the entire decision is grounded, but, we submit, it disregards the burden of proof rule.

Now mark that the court held that *it did not appear* that it would have been difficult, and certainly not im-

possible, etc. to close the hatch between No. 1 'tween decks and No. 1 hold. And *because it did not so appear,* the court held that appellant was liable. The clear effect of that ruling was to impose upon libelant the burden of showing that it would have been difficult, or impossible, to do the act which the District Court would have required. The effect of the decision is to hold *that because appellant did not make it appear* that it would have been difficult, or impossible, to move or raise the cargo and close the hatch, *it was to be held liable.* Plainly that impressed upon appellant the burden of proving that the damage did not result from the moving or the raising of the cargo, and the closing of the hatch.

But the burden of proof, under the rule, was upon appellees to show that the negligence of the vessel caused the damage. Appellees had not sustained the burden, and the court's decision impliedly so finds, and yet such was a condition precedent to their right of recovery.

Furthermore, there is no evidence that if the baskets and general cargo in the square of No. 1 'tween deck hatch could have been removed, as the master said was impossible, the hatch between No. 1 'tween decks and No. 1 hold could have been closed so as to prevent the passage of the heated air. The ship was completely loaded with cargo, all of her compartments being stowed full. All of the hatch covers on the 'tween deck hatch were not laid as it was not customary to do so. Where the hatch covers not so laid were stowed on board the ship does not appear from the record, nor was any

inquiry thereof made by appellees during the trial. Certainly reason teaches us that they were not carried on the upper deck of the vessel, where they would be exposed to the wash of the seas, and so far as the evidence discloses they may well have been, and probably were, stowed on the 'tween decks in the wings of the hold beneath or back of other cargo. If they were not accessible, then they could not have been used to close the hatch, and the hatch could not, in fact, have been closed had the cargo been removed. But, as we have pointed out, the record is devoid of any evidence showing that means were available to close the hatch, as the District Court would require it.

The burden of proving that the hatch could have been closed, if that were the proper course to have been pursued, was upon appellees, and yet the court, by its decision, has, in effect, held appellant responsible because it did not show that the hatches could not be closed. In other words, the court has manifestly disregarded the burden of proof rule which is applicable to the case, and has condemned appellant because it has not sustained the converse of the burden which rests upon appellees.

We respectfully submit that, on the record, the District Court erred in holding that there was any negligence on the part of the carrying steamer in the custody and care of the cargo, and in not deciding that appellees had not sustained the burden of proving that the damages were caused by the negligence of the steamer.

IV.

THE FAILURE TO REMOVE THE CARGO STOWED IN THE 'TWEEN DECKS AND THE FAILURE TO CLOSE THE 'TWEEN-DECKS HATCH, IF NEGLIGENCE, WAS NEGLIGENCE IN THE MANAGEMENT OF THE VESSEL.

On the voyage from Antwerp to Las Palmas and the ports of discharge, the 'tween decks hatch was not tight, as was customary on ships of that type, as well as on all cargo-carrying vessels. Covers were placed across the beams of that hatch. Upon those were placed a general cargo. That cargo was so stowed that slight spaces existed between the cases in which the cargo was contained. By this means the ventilation of the compartments was increased.

The District Court held the steamer liable for damages to appellees' cargo because of the omission of the officers of the vessel to make the 'tween deck hatch tight so that neither the air passing from the open main deck hatch could reach the lower hold or the heat from the lower hold could reach the 'tween decks compartment. For thus omitting to do something in the management of the ship after the voyage commenced, the shipowner, who had performed its duty by making the vessel in all respects seaworthy, is condemned.

Obviously, any mismanagement of the ship or her appliances in navigation or otherwise is a want of proper care as regards the cargo. As said by this court, speaking through Judge Ross, in

> *Corsar v. J. D. Spreckels & Bros. Co.,* 141 Fed. 260, 263.

> "Undoubtedly a fault or error in the navigation or management of a vessel carrying cargo may, and often does, result in injury to the 'custody, care and delivery' of the cargo. * * * But, if the owner of the vessel has performed his duty by making the vessel in all respects, seaworthy for the voyage it undertakes, it is plain that neither he nor the vessel can be held responsible for any merely incidental damage resulting to the cargo from a fault or error in its subsequent navigation or management, if section 3 of the act is to be given any force."

Here, we are not dealing with any act which caused any damage to the cargo. On the contrary, we are alone concerned with the failure at a port of call for coaling to rearrange a vessel that was by the shipowner made seaworthy when the voyage commenced. If the vessel was seaworthy in that condition at the commencement of the voyage, it would seem to follow that the failure to change that condition is an omission to perform something in connection with the management of the vessel after the shipowner had performed his duty of sending out a seaworthy vessel.

It is true that the reason for a change in the arrangement of the vessel would be for the benefit of the cargo, as distinguished from the rearrangement of a part of the vessel in no wise connected with the cargo, but that distinction is apparent in many of the cases and still the courts have held the error to have been in the management of the vessel, rather than negligence in the care and custody of the cargo.

Thus the failure to operate pumps, when it is known that water which is certain to damage cargo is in a

cargo compartment has been held to be negligence in the management of the vessel. Obviously the working of the pumps would have a direct bearing upon relieving the damaged condition of the cargo. It would of course be negligence in the caring for the cargo, but it would also be negligence in the management of the vessel.

Judge Brown had such a question presented to him in

The Ontario, 106 Fed. 324, 327.

In that case (which was affirmed in *Grubnan v. The Ontario,* 115 Fed. 769), a ballast tank of an ocean steamer sprung a leak during the voyage, and the water accumulated in the hold above in sufficient quantity to damage the cargo stowed therein. The leak was known to the engineer and carpenter, but both failed to report it to the chief officer, to give it proper examination, or to use the pump with sufficient frequency to prevent an accumulation of water in the hold. The pump was sufficient, and a proper use of it would have prevented injury to the cargo. Judge Brown held that the damage to the wool was due to the failure of the men to give the leak sufficient attention and to use the pump with sufficient frequency, saying:

> "But no attempt was made to ascertain whether there was any accumulation of water over the limbers, or any damage arising to the cargo. The continuance of the leak was evident from the necessity of pumping every watch. * * * The omission to report the leak to the chief officer so that an examination might be made for the protection of the cargo, and neglect to keep the pump going enough to prevent accumulation of water and the swelling of the limber coverings, were

negligence in the 'management of the ship' during the voyage."

Again, a similar question was presented in

The British King, 89 Fed. 872, 873,

where a vessel in very rough weather took in considerable water, thereby causing damage to the cargo. It was *then known that 14 inches of water was in the bilges.* Yet, soundings were not taken and the pumps were not used. The court, in that case, said:

> "It was a very plain lack of ordinary prudence, and hence was negligence, not to make any soundings during the following 10 hours up to 6 a. m. of the next day, during which time an accumulation of water at the same rate as during the preceding four hours must manifestly exceed 20 inches, which, as all knew, would be dangerous to the cargo. The accumulation of water from 6 to 10 p. m. was extraordinary; and if not of itself indicative of the specific cause afterwards ascertained, it was at least plainly indicative of the necessity of more frequent soundings and pumping during the continuance of heavy weather. * * * The failure to take soundings and to apply the pumps as the known facts showed to be necessary, was therefore the final and immediate cause of the damage. But for this negligence the ship and owners are not liable under the third section of the Harter Act; because it was negligence in the 'management of the ship.' The Sandfield, 79 Fed. 371; The Mexican Prince, 82 Fed. 484; The Silvia, 15 C. C. A. 362. 68 Fed. 230."

While it may be that the failure to relieve the danger to the cargo, then known to exist, by removing the water, is, in a certain sense, negligence in the care and

custody of the cargo, it is also negligence in the management of the ship after the voyage commenced.

For the same reason the failure to relieve the danger to appellees' cargo, then known to exist, by making the 'tween decks hatch tight and thereby prevent any heated air, generated by the bone meal, from passing through the spaces of the cargo stowed on the hatch is, if negligence at all, similarly negligence in the management of the ship.

It would undoubtedly be negligence in the care of the cargo if the goods were damaged because of the negligence of the officers of the vessel in leaving off the hatches in a storm, by reason of which the seas entered and damaged the cargo. Such negligence, however, would come within the application of the rule announced in

The Silvia, 171 U. S. 452, 465, 43 L. Ed. 241,

where the Supreme Court, in speaking of the words navigation and management, within the meaning of the Harter Act, said:

They

> "might not include stowage of cargo not affecting the fitness of the ship to carry her cargo. But they do include, at the least, the control, during the voyage, of everything with which the vessel is equipped for the purpose of protecting her and her cargo against the inroad of the seas; and if there was any neglect in not closing the iron covers of the ports, it was a fault or error in the navigation or in the management of the ship."

If a shipowner is thus relieved from the negligent omission of his employees to prevent water from getting

into a cargo compartment, assuming of course that he had performed his duty of sending out a seaworthy vessel, why should not a shipowner who has also sent out a seaworthy vessel be relieved from the omission of his employees to try to remedy a condition brought about, not by negligence but by something over which he had no control, the inherent vice of other cargo carried aboard the vessel? There is no material difference between the failure to close the hatch so as to prevent water from reaching the cargo, which would of course be known to damage cargo, and the failure to close and make tight the 'tween decks hatch so as to prevent the heated air from reaching the cargo. Particularly is this true in view of the fact that it might very well be said that the 'tween decks hatch was not the only means of the heat of the lower hold passing on to, or reaching, the cargo stowed in the 'tween decks. The steel deck itself, upon which appellees' cargo was stowed, was the best conductor of any heat generated and discharged by the inherent vice of the bone meal stowed in No. 1 lower hold.

A question calling for a construction of the Harter Act, where there was a failure to remove a part of the cargo at an intermediate port, was presented to Judge Brown in

The Guadeloupe, 92 Fed. 670, 671.

In that case, a vessel put into an intermediate port for repairs occasioned by stress of weather. It was contended that, while at that port, the cargo should have been removed for the purpose of examining the ship so that the damage to the cargo might be lessened

or prevented. In answer to that contention, that learned judge said:

> "But the question whether the cargo should be removed, and to what extent, for the purpose of examining the interior of the ship, thereby incurring certain considerable expense, was a question for the exercise of the master's judgment. * * * If any error was committed in this respect, I think it was an error of judgment. It was an error, moreover, pertaining to the 'management' of the ship; since the question arose after the voyage had commenced, at a port of distress, far from the home port, and away from any supervision by the owners, and was wholly subject to the master's determination."

The same principle was announced by the Circuit Court of Appeals for the Second Circuit in

> *United States v. New York & O. S. S. Co.,*
> 216 Fed. 61, 71,

where the government contended that the shipowner was not relieved from liability by the Harter Act for damage to its cargo, for the reason that the cargo *was not properly cared for during the voyage;* that is, while the ship was at Algiers for 36 hours no inspection was made to discover whether or not any of its cargo had been damaged, and no inspection was made to remedy any damaged or defective condition of the vessel which might be found by said examination. The court in that case said:

> "But the government also contends that the petitioner is not relieved by the provisions of the Harter Act for the reason that the cargo was not properly cared for during the voyage. It seems that the ship on its way to Manila reached Algiers

on November 12th which was subsequent to the storm which the vessel had encountered, and that she stopped there about 36 hours taking on coal. It was discovered after the storm was over that water had entered No. 2 bilge, and also No. 4 bilge and the pumps were at once set to work and the water was pumped out. It was not known that any water had drained into No. 3 hatch where the government cargo was stowed. When the ship reached Manila it was discovered that the storm had strained some of the hatches, and among others hatch No. 3, and that sea water had entered and damaged the government's merchandise.. The government complains because while the ship was at Algiers no inspection was made to discover whether water had entered hatch No. 3, or to determine at what point the water found in the bilges had entered. But it seems to us that, the vessel being seaworthy when she began her voyage, the failure to make the inspection at an intermediate port, if such an inspection ought to have been made, must be regarded as a fault in management of the ship under the third section of the Harter Act. The Guadeloupe (D. C.), 92 Fed. 670 (1899). That act provides that if the owner of any vessel transporting merchandise to or from any port in the United States exercises due diligence to make the vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner, agent, or charterer shall become or be held responsible for damage or loss resulting from faults or errors of navigation or in the management of said vessel. The act was 'intended to relieve the shipowner who has done all that he can do to start off a well-fitted expedition, from liability for damages caused by faults or errors of his shipment after his ship has gone below the horizon and away from his personal observation.' Benedict's Admiralty, sec, 229."

We respectfully submit that if the omission to close the 'tween decks hatch was negligence, it was negligence

in the management of the vessel for which the appellant is relieved from liability by section 3 of the Harter Act.

V.

THE DAMAGE TO APPELLEES' CARGO RESULTED FROM THE INHERENT DEFECT, QUALITY OR VICE OF THE BONE MEAL.

Section 3 of the Act of February 13, 1893, known as the Harter Act, in part, provides as follows:

> "That if the shipowner of any vessel transporting merchandise or property * * * shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent or charterers, shall become or be held responsible for damage or loss resulting from * * * the inherent defect, quality or vice of the thing carried."

The learned court below has found that the cause of the damage to appellees' cargo was the heat generated from the bone meal stowed in No. 1 lower hold. It did not hold that it was negligence to so stow the bone meal, or that there was any reason to suppose that bone meal would heat. On the contrary, as before pointed out, bone meal had never before been known to heat. Consequently there was no reason to anticipate that it would heat upon this voyage.

It is to be noted that the temperature of No. 1 lower hold was, for several days before reaching Las Palmas, much higher than that of the other holds. If, therefore, that heat was the cause of the breaking of the

bottles in which was contained apollinaris water, that damage must have occurred because of the inherent defect, quality or vice of the bone meal long before the vessel reached the intermediate port of Las Palmas.

The primary and proximate cause of appellees' damage, therefore, is something for which the shipowner is relieved from liability by section 3 of the Harter Act. Nothing that could be said to have been negligence on the part of the ship until the vessel's arrival at that port made the danger operative. The efficient cause or *causa causans* of the loss was the heat of the bone meal,—something for which the shipowner is not in any manner responsible.

We respectfully submit that appellant is not liable for the damages to appellees' cargo which resulted from the inherent defect, quality or vice of the bone meal.

For the reasons assigned, we respectfully submit that the decree of the lower court should be reversed, with directions to dismiss the libel with costs.

Dated, San Francisco,
May 26, 1916.

Edward J. McCutchen,
Ira A. Campbell,
McCutchen, Olney & Willard,
Proctors for Appellant.